

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re

VICTOR BOSSERDT and ZINAIDA  
BOSSERDT,

Debtors.

NONNA VERD,

Plaintiff,

v.

VICTOR BOSSERDT and ZINAIDA  
BOSSERDT,

Defendants.

No. C10-143Z

Bankr. Internal Appeal No. 10-S003

ORDER

THIS MATTER comes before the Court on appeal from the United States Bankruptcy Court for the Western District of Washington. Having reviewed the opening, response, and reply briefs, as well as the record on review, the Court now AFFIRMS the Bankruptcy Court.

**Background**

In 2006, Nonna Verd and Zinaida Bosserdt agreed to join in a banquet and catering business that would be an expansion of a restaurant Verd had opened two years earlier. Verd Decl. ¶¶ 15-16, docket no. 17-2, 5-6. Accordingly, Verd and Bosserdt registered a new corporation, RUNAR, Inc., on September 29, 2006. Id. ¶ 16 at 6. Both Verd and Bossert

1 served as corporate officers of RUNAR. Initial Pro Se Br., App. 10, docket no. 15-2, 50.  
2 They intended RUNAR to operate the banquet and catering business despite Verd having  
3 already incorporated the restaurant business as King Pastry and Deli, Inc. (“KPD”) two years  
4 earlier. Initial Pro Se Br., App. 13, docket no. 15-2, 56. Verd owned eighty percent (80%)  
5 of KPD and the remaining shares were owned by Tamara Babadzhanova who also was a  
6 creditor of KPD with outstanding loans. Verd Decl. ¶ 20, docket no. 17-2, 7. To obtain  
7 equal ownership interest in RUNAR,<sup>1</sup> Verd agreed to contribute her share of KPD while  
8 Bosserdt agreed to contribute cash to purchase Babadzhanova’s interest in KPD, pay off  
9 certain loans, and remodel the expanded business premises. Id. ¶¶ 18-21 at 6-7.

10 Verd and Bosserdt drafted a Stock Purchase and Sale agreement that appears intended  
11 to consolidate free and clear ownership of KPD in themselves. Bosserdt agreed to pay  
12 \$200,000 (as part of her contribution to RUNAR) to Babadzhanova who would transfer her  
13 outstanding shares of KPD back to KPD and release KPD from specific debts. Verd Decl.,  
14 App. 2, docket no. 17-2, 54. Bosserdt paid the \$200,000 to Babadzhanova’s attorney on  
15 September 20, 2006 from the corporate bank account of INVIZ, Inc.<sup>2</sup> Verd Decl., App.3,

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23 <sup>1</sup> Verd and Bosserdt consistently referred to themselves as equal owners of RUNAR. Verd Decl.  
24 ¶ 16, docket no. 17-2, 6; Bosserdt Decl. ¶ 3, docket no. 16-3, 22. However, RUNAR never issued  
stock. Hr’g Tr., docket no. 15-2, 7.

25 <sup>2</sup> Earlier that year, Verd and Bosserdt had attempted a different business, INVIZ, Inc., which never  
26 began operations. Verd Decl. ¶ 13, docket no. 17-2, 5. Bosserdt had deposited funds into the INVIZ  
bank account and both Verd and Bosserdt now treated those funds as part of Bosserdt’s contribution  
to RUNAR. Id. ¶ 30 at 9; Bosserdt Decl. ¶ 5, docket no. 16-3, 23.

1 docket 17-2, 61. Verd agreed to transfer all her stock in KPD to Bosserdt.<sup>3</sup> Id. After this  
2 transaction, Bosserdt owned all outstanding shares of KPD stock.

3 Although the banquet business apparently operated as planned for a short time, a  
4 misunderstanding between the parties arose over Verd's use of funds in the INVIZ account to  
5 pay debts related to previous KPD operations. See Verd Decl. ¶¶ 41-44, docket no. 17-2, 12.  
6 In early 2007, Bosserdt advised many banquet and catering customers to request refunds of  
7 their deposits. Verd Decl., ¶¶ 49 & 63, docket no. 17-2, 13 & 93. RUNAR revenue then  
8 declined sharply and stopped altogether in May. Interrogs. of Pl., No. 8, docket no. 16-4, 18.  
9 The business had not paid rent for several months and, on June 7, 2007, the business received  
10 a Pay Rent or Vacate Notice from its landlord. Answer, Ex. E, docket no. 16-2, 44.

11 Bosserdt later attempted to negotiate a lease that did not include Verd. Verd. Decl.,  
12 App. 12, docket no. 17-2, 94; Verd. Decl., App. 13, docket no. 17-3, 2; Verd. Decl., App. 19,  
13 docket no. 17-3, 41; Verd. Decl., App. 28 and 29, docket no. 17-4, 29-34. When Verd  
14 learned of Bosserdt's negotiations, she notified the landlord that any modification to the lease  
15 would require Verd's approval because of her ownership interest in RUNAR. Verd. Decl.,  
16 App. 20, docket 17-3, 43. Bosserdt received offers to sell "the business" although it is  
17 unclear whether the offers refer to KPD or RUNAR. Verd. Decl., App. 21-24, docket no. 17-  
18 4, 1-12. In any case, there is no evidence that either KPD or RUNAR were sold or resumed  
19 operation. The landlord disposed of all operating assets on the business premises after Verd  
20 and Bosserdt ignored requests to remove them. Warnick Decl. ¶¶ 4-6, docket no. 16-3, 3.

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22 <sup>3</sup> The parties intended KPD to operate as a subsidiary of RUNAR and to have KPD cease all  
23 independent operations and tax reporting. Verd Decl. ¶ 23, docket no. 17-2, 7. Accordingly, KPD  
24 filed a final tax return on September 30, 2006 indicating an intent to cease operations. Verd Decl.  
25 App. 4, docket no. 17-2, 64. The parties apparently intended that Bosserdt would transfer her KPD  
26 stock to RUNAR. See Verd Decl. ¶ 23, docket no. 17-2, 7; Bosserdt Decl. ¶ 3, docket no. 16-3, 22  
("I invested all of my KPD stock into RUNAR."). Despite these intentions, there is no evidence that  
Bosserdt transferred the KDP stock to RUNAR. This failure seems to have caused confusion for  
both parties and later formed the basis for Bosserdt's attorney's claim that Bosserdt was the sole  
owner of KPD. Initial Pro Se Br., App. 8, docket no. 15-2, 46.

1 After the parties' business relationship had fallen apart, Bosserdt told the Washington  
2 Department of Financial Institutions ("WDFI") and other officials that Verd did not disclose  
3 the Babadzhanova debts when Verd transferred KPD stock to her. Bankr. Adv. No. 09-  
4 010000-SJS, Carlson Decl. ¶ 92, docket no. 19, 2.

5 In September 2007, Verd filed an action for breach of fiduciary duty against Bosserdt  
6 in King County Superior Court arising from the operation of RUNAR. Superior Court 07-2-  
7 29212-8SEA, Compl., docket no. 15-2, 35. Bosserdt filed for Chapter 7 Bankruptcy in  
8 October 2008 and Verd's Superior Court claim was listed as a contingent liability in  
9 Bosserdt's bankruptcy schedule. Ch. 7 No. 08-16512 SJS, Petition, docket no. 1. Verd  
10 initiated an adversary proceeding in January 2009 alleging that Bosserdt's debt was non-  
11 dischargeable because it was the result of: (1) false representations or fraud, U.S.C.  
12 §523(a)(2)(A); (2) fraud or defalcation while acting in a fiduciary capacity, U.S.C.  
13 §523(a)(4); and (3) willful and malicious injury, U.S.C. §523(a)(4). Bankr. Adv. No. 09-  
14 010000-SJS, Compl., docket no. 1. After a hearing, the Bankruptcy Court granted Bosserdt's  
15 motion for summary judgment and discharged the debt. Judgment, docket no. 1-5. Verd  
16 now timely appeals. Notice of Appeal, docket no. 1-2.

## 17 **Discussion**

### 18 **A. Standard of Review**

19 A district court reviews the bankruptcy court's conclusions of law de novo and  
20 reviews determinations of fact for clear error. Neilson v. United States (In re Olshan), 356  
21 F.3d 1078, 1083 (9th Cir. 2004).

22 Summary judgment should be granted if the admissible evidence shows "that there is  
23 no genuine issue as to any material fact and that the movant is entitled to judgment as a  
24 matter of law." Fed. R. Civ. P. Rule 56(c). The court draws all inferences from the  
25 admissible evidence in the light most favorable to the non-moving party. Addisu v. Fred  
26 Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). Where, as here, the non-moving party

1 bears the burden of proof at trial, that party must go beyond the pleadings “and designate  
2 specific facts showing that there is a genuine issue for trial” after the movant has informed  
3 the court of the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477  
4 U.S. 317, 323 (1986).

5 Exceptions to discharge under 11 U.S.C. § 523 must be proven by a preponderance of  
6 the evidence rather than clear and convincing evidence, even for claims of fraud. Grogan v.  
7 Garner, 498 U.S. 279, 286 (1991).

8 **B. No Exception to Discharge**

9 None of appellant’s claims for exception to discharge have merit. Appellant has  
10 claimed error in each of three alternative causes of action under 11 U.S.C. § 523: (1) debt  
11 based on false representations or fraud; (2) debt based on fraud or defalcation while acting in  
12 a fiduciary capacity; and (3) debt for willful and malicious injury. As any one claim, if  
13 meritorious, would be sufficient to preclude discharge, the Court will address each claim  
14 separately.

15 1. False Representation or Fraud

16 Bankruptcy statutes do “not discharge an individual debtor from any debt of money,  
17 property [or] services . . . to the extent obtained by false pretenses, a false representation, or  
18 actual fraud, . . .” 11 U.S.C. § 523(a)(2)(A). This exception from discharge requires, among  
19 other elements, a showing that the misrepresentation caused the creditor loss or damage. In  
20 re Hultquist, 101 B.R. 180, 183 (B.A.P. 9th Cir. 1989).

21 Verd alleges Bosserdt made false representations by failing to disclose that she was  
22 (1) “spreading false rumors” (to encourage customers to cancel orders and request deposit  
23 refunds); (2) negotiating with the landlord to lease the RUNAR business premises under  
24 another name; and (3) negotiating to sell RUNAR’s assets and retain the proceeds.

25 Verd does not explain how any of these non-disclosures caused her damage. There is  
26 no evidence that Verd would have acted any differently or would have been in a better

1 position if Bosserdt's recommendations to customers had been disclosed. Any damage from  
2 Bosserdt's recommendations to customers seems to be a result of the recommendations  
3 themselves, not whether they were disclosed. The non-disclosure of negotiations with the  
4 landlord also did not change Verd's position. There was no new lease or modification of the  
5 lease facilitated by the non-disclosure. Bosserdt also notified Verd of multiple offers to  
6 purchase the business. Offers, disclosed or non-disclosed did not change Verd's position  
7 because there is no evidence of an actual sale. Consequently, Verd has not shown that  
8 Bosserdt's actions caused her any damages and the Bankruptcy Court properly dismissed this  
9 claim. See Hultquist, 101 B.R. at 83.

10 2. Fraud or Defalcation While Acting in a Fiduciary Capacity

11 An exception from discharge is made for "any debt for fraud or defalcation while  
12 acting in a fiduciary capacity." 11 U.S.C. §523(a)(4). The exception applies "where (1) an  
13 express trust existed; (2) the debt was caused by fraud or defalcation; and (3) the debtor acted  
14 as a fiduciary to the creditor at the time the debt was created." In re Bigelow, 271 B.R. 178,  
15 186 (B.A.P. 9th Cir. 2001). The first element, the existence of an express trust, is defined by  
16 state law. In re Hulquist, 101 B.R. 180, 183 (9th Cir. B.A.P. (Wash.), 1989).

17 The Court assumes without deciding that Bosserdt, as a corporate officer, had a  
18 fiduciary duty to the corporation and its owners under these circumstances.<sup>4</sup> This duty  
19 extended to Verd as one of the owners of RUNAR. Even so, Verd submitted no evidence of  
20 a debt that resulted from a breach of this fiduciary duty. Instead, Verd relies on the same  
21 non-disclosures the court has already concluded did not cause damage to Verd. There is no  
22 debt, and consequently the Bankruptcy Court properly dismissed this claim.

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<sup>4</sup> This assumption is consistent with Butko v. Healy (In re Healy), 61 Fed.Appx. 350, 2003 WL 1497986, at \*2 n.1 (9th Cir.) (holding that, under Washington law, corporate officers act in a fiduciary capacity within the meaning of 11 U.S.C. §523(a)(4)).

1           3. Willful and Malicious Injury

2           An exception from discharge may be made for “any debt for willful and malicious  
3 injury.” 11 U.S.C. §523(a)(6). “[W]illfulness and malice are two separate requirements.”  
4 Dakota Steel, Inc. v. Erik Dakota (In re Erik Dakota), 284 B.R. 711, 726 (Bankr. N.D. Cal.  
5 2002). “A malicious injury involves: (1) a wrongful act; (2) done intentionally; (3) which  
6 necessarily causes injury; and (4) is done without justification or excuse.” Id. The exception  
7 applies to a willful injury, not merely a willful act that causes injury. Kawaauhau v. Geiger,  
8 523 U.S. 57, 60 (1998).

9           Bosserdt signed the Stock Purchase and Sale Agreement which disclosed certain KPD  
10 debts; she later misrepresented to the WDFI that Verd failed to disclose these debts at the  
11 time Verd transferred King Pastry and Deli stock. Verd is entitled to the reasonable  
12 inferences that this representation was intended to harm her and that Bosserdt acted without  
13 justification. Bosserdt has not refuted these inferences. However, Verd submitted no  
14 evidence of injury resulting from Bosserdt’s conduct.<sup>5</sup> Consequently, the Bankruptcy Court  
15 properly dismissed this claim. See Dakota, 284 B.R. at 726.

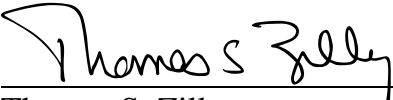
16 **C. Conclusion**

17           For the foregoing reasons, Bankruptcy Judge Samuel J. Steiner’s Order, entered as  
18 docket no. 32 in Case No. 09-01000-SJS (Bankr. W.D. Wash. Jan. 8, 2010) is AFFIRMED.  
19 Bosserdt’s debt to Verd was properly discharged. The Clerk is directed to enter judgment  
20 consistent with this Order, to CLOSE this case, and to send a copy of this Order to all  
21 counsel of record, to the pro se appellant, and to Bankruptcy Judge Samuel J. Steiner.

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25 <sup>5</sup> Verd faces significant fines based on charges by the WDFI. Resp. Br., Ex. G, docket no. 16-2, 64.  
26 However, Verd provides no evidence that these fines are the result of Bosserdt’s false  
misrepresentations rather than actual violations and Verd does not claim the amount of these fines  
as damages.

1 IT IS SO ORDERED.

2 DATED this 17th day of September, 2010.

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5 Thomas S. Zilly  
6 United States District Judge  
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